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In the

Supreme Court of the United States

October Term, 1956

No. 763

THE SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA, AND FENDALL R. ELLIS, DIVISION SUPERINTENDENT OF SCHOOLS OF THE CITY OF CHARLOTTESVILLE, VIRGINIA,
Petitioners

v.

DORIS MARIE ALLEN, ET AL.,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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TABLE OF CONTENTS

	Page
Opinions of Courts Below	2
Statement of Jurisdiction	2
Questions Presented	2
The Constitutional Provisions and Statutes Involved	3
Statement of the Case	5
Argument	8
I. The Respondents Are Prohibited by the Eleventh Amendment from Maintaining This Action	8
A. This Action Is a Suit Against the State	9
B. The State Has Not Given Its Consent To Be Sued in a Federal Court	12
II. Respondents Have Failed to Prove a Case Upon Which the District Court Could Have Granted Injunctive Relief	14
III. The Respondents Have Not Exhausted Their Administrative Remedies	21
IV. The District Court Abused Its Discretion by Entering an Order Effective September, 1956	25
Conclusion	27

Appendix:

I. Opinion of Court of Appeals for Fourth Circuit ..... App. 1

TABLE OF CITATIONS

Cases

Page

Board of Supervisors v. County School Board, 182 Va. 266 (1944) 10

Briggs v. Elliott, 132 F. Supp. 776 ..... 18, 25

Brown v. Board of Education of Topeka (May 17, 1954), 347 U. S. 483, and (May 31, 1955) 349 U. S. 294 14

Bush v. Orleans Parrish School Board, 138 F. Supp, 337 (U. S. D. C., ED, La., 1956) 25, 26

Carson v. Board of Education of McDowell County, 227 F. (2d) 789 (4th Cir., 1955) 22

Duhne v. New Jersey, 251 U. S. 311 (1920) 9

Ex Parte New York, 256 U. S. 490 (1921) 9

Ex Parte Young, 209 U. S. 123 (1908) 9

Fitts v. McGhee, 172 U. S. 516 (1899) 9

Ford Motor Co. v. Department of Treasury, 323 U. S. 459 (1945) 13

Georgia R. R. & Banking Co. v. Redwine, 342 U. S. 300 (1952) 9

Great Northern Life Ins. Co. v. Read, 322 U. S. 47 (1944) 12

Hans v. Louisiana, 134 U. S. 1 (1890) 9

Hood v. Board of Trustees, 232 F. (2d) 626 (4th Cir., 1956) 24

Kennecott Copper Corporation v. State Tax Comm'r., 327 U. S. 573 (1946) 13

Maia v. Eastern State Hospital, 97 Va. 507 (1899) 14

Matthews v. Launius, 134 F. Supp. 684 (U. S. D. C., W. D. Ark., 1955) 26

Page

Missouri v. Fiske, 290 U. S. 18 (1933) 11

O'Neill v. Early, 208 F. (2d) 286 (4th Cir., 1953) 10, 13

Osborn v. Bank of United States, 9 Wheat. 738 9

Sterling v. Constantin, 287 U. S. 378 (1932) 10

Other Authorities

Code of Virginia (1950) :

Section 22-94 ..... 3, 12

Section 22-57 ..... 4, 21

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, the School Board of the City of Charlottesville, Virginia, and Fendall R. Ellis, Division Superintendent of Schools of the City of Charlottesville, Virginia, respectfully pray that a writ of *certiorari* be issued out of and under the seal of the Court to review the decision of the United States Court of Appeals for the Fourth Circuit hereinafter set forth and represent as follows:

OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals was rendered on December 31, 1956, and is printed as Appendix I to this petition.

The opinion of the District Court for the Western District of Virginia, at Charlottesville, was rendered on August 6, 1956, and is printed as Appendix IV of "Appendix on Behalf of Appellants," which is made a part of the record in this case in accordance with paragraph 4 of Rule 21 of this Court. In accordance with Rule 23, paragraph 1(i) of this Court, it is not reprinted here.

STATEMENT OF JURISDICTION

The final decree of the District Court was entered on August 6, 1956, a copy of which is found as Appendix III of "Appendix on Behalf of Appellants," and the Court of Appeals affirmed said decree on December 31, 1956.

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1245 (June 25, 1948, c. 646, 62 Stat. 928).

THE QUESTIONS PRESENTED

Point I

May a federal district court enjoin a local school board, which is admittedly an agency of the Commonwealth of Virginia, a State officer in his official capacity when the Commonwealth has not given its consent to be sued?

Point II

Is there any case or controversy presented by this action over which a federal district court has jurisdiction?

Point III

Have the respondents exhausted their administrative remedies so as to entitle them to relief in a federal district court?

Point IV

Under the facts of this case and the law applicable thereto, has not the federal district court abused its discretion by entering its order which had the effect of compelling integration by the commencement of the September, 1956, school term?

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eleventh Amendment to the Constitution of the United States reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Section 22-94, Code of Virginia (1950), Vol. 5, page 25, reads as follows:

> "§ 22-94. Constitutes a corporation; powers and duties generally.—The school trustees of each city shall be a body corporate under the name and style of 'The School Board of the City of .....,' by which name it may sue and be sued, contract and contracted with, and purchase, take, hold, lease, and convey school property, both real and personal. The title to all school property both real and personal, within the city shall vest in the board, except by mutual consent of the council and school board the title to property may vest

in the city. The trustees of the several districts, where there are more than one, shall have no organization or duties except such as may be assigned to them by the consolidated body."

Section 22-57, Code of Virginia (1950), Vol. 5, pages 14-15, reads as follows:

"Any five interested heads of families, residents of the county, or city, who may feel themselves aggrieved by the action of the county or city school board, may, within thirty days after such action, state their complaint, in writing, to the division superintendent of schools who, if he cannot within ten days after the receipt of the complaint, satisfactorily adjust the same, shall, within five days thereafter, at the request of any party in interest, grant an appeal to the circuit court of the county or corporation court of the city or the judge thereof in vacation who shall decide finally all questions at issue, but the action of the school board on questions of discretion shall be final unless the board has exceeded its authority or has acted corruptly. The proceedings on such an appeal shall be informal, and no pleading shall be required, other than the complaint hereinabove provided for. A copy of the order shall also be entered by the clerk of the board in the minute book of the county or city board.

"When a school is owned or operated jointly by two or more counties, all questions arising with reference to the school, shall be voted on by the county school boards of the counties jointly, and the majority vote of the combined boards shall be final, unless appealed from as provided in this section. In the event of an appeal from the joint action of such boards, the complaint shall be made to the division superintendents of both counties affected, and if they cannot adjust the same as provided in this section, an appeal shall be allowed to the circuit court of the county or the corporation court of the city or the judge thereof in vacation."

STATEMENT OF THE CASE

This class action came on to be heard in the District Court on July 12, 1956, upon the complaint of the respondents, the answer of the petitioners and evidence offered by both parties, including exhibits, depositions and testimony. The jurisdiction of the Court was invoked pursuant to Title 28, United States Code, Section 1343.

The respondents prayed that a preliminary and permanent injunction be granted restraining and enjoining the petitioners from enforcing and pursuing against respondents the policy and custom of precluding, on the basis of race or color, their admission to the public schools of the City of Charlottesville.

The petitioners, in answer, asserted that they were not required to integrate the public schools of the City of Charlottesville and moved the District Court to dismiss the complaint on the grounds, among others, that the action involved no case or controversy upon which relief should be granted and that the State had not given its consent to be sued in this action.

On August 6, 1956, the District Court entered its order, effective at the commencement of the school term beginning in September, 1956, restraining and enjoining the petitioners from any action that would regulate or affect, on the basis of race or color, the admission, enrollment or education of the respondents, or other Negro children similarly situated, to or in any public school operated by the petitioners.

An appeal was timely noted and the Court of Appeals heard argument on November 27, 1956. Its decision was handed down on December 31, 1956.

The respondents stated in their bill of complaint that the school board is an administrative department of the Commonwealth of Virginia. The petitioners agree. The respondents further alleged that Fendall R. Ellis, Division

Superintendent of Schools for the City of Charlottesville, is an administrative officer of the Commonwealth of Virginia. To this allegation, the petitioners also agree.

The complaint also alleged that the respondents made a formal demand that the petitioners conform to the school segregation decision of the Supreme Court of the United States and discontinue the policy and custom of operating a segregated school system. It was further alleged that the respondents "possess all qualifications and satisfy all requirements" for admission to the public schools of the City of Charlottesville.

In order to sustain the aforesaid allegations, the respondents introduced certain exhibits and presented two witnesses, one of which was Fendall R. Ellis. The substance of the respondents' evidence is as follows:

1. A petition, marked Plaintiffs' Exhibit "A", was mailed to the petitioners by certain attorneys on October 6, 1955, on behalf of some forty-four children. It was stated that these children were eligible to attend the public schools of the City of Charlottesville. The petition also demanded that the petitioners "take immediate steps to reorganize the public schools" and pointed out that the petitioners were "duty bound to take immediate concrete steps leading to early elimination of segregation in the public schools."

2. Plaintiffs' Exhibit "B" represents the reply of the petitioners to the respondents' petition and is in the form of a resolution adopted by the school board. The resolution stated that a solution to the problem presented by the school segregation decisions could be found only "after sober reflection over a period of time." Reference was also made to a former resolution of the school board, adopted July 8, 1955, wherein it was resolved "to begin promptly a study of the future operation of the City's public school system in the light of the Supreme Court decrees of May 31, 1955."

3. George R. Ferguson was called as a witness and stated that he was a Negro and that his child, one of the respondents, attended Burley High School which was operated jointly by the City of Charlottesville and the County of Albemarle for members of the Negro race. It was then conceded by counsel that all of the respondents were Negroes who resided in the City of Charlottesville and were eligible to attend the public schools.

4. Fendall R. Ellis was called as an adverse witness. He testified that there were six elementary schools in the City of Charlottesville, five of which were attended by white children and one of which was attended by Negro children. There is one white high school and one Negro high school, which is jointly owned and operated by the City and County. Mr. Ellis also testified that the school budget for the school year, 1956-57, had been adopted and submitted to the City Council prior to April 1, 1956, and that the school board had approved no plan "to desegregate the city school for the school term 1956-1957." Upon questioning by the Court, Mr. Ellis stated that there were 2,436 white children in the elementary schools and 761 Negro children. There were 897 white children and 281 Negro children enrolled in the high schools.

As their principal evidence, the petitioners introduced the depositions of Fendall R. Ellis and of James H. Michael, Jr., a member of the school board. Mr. Ellis stated that preparations for the operations of the schools for the year, 1956-1957, had been completed and that a change at such a late date "would not only occasion great difficulty, but would also be most disruptive and impractical." He further stated that any change of plans involving the transfer of school children "would be most disruptive of orderly procedure and prove of harmful effect in the administration of the public school system."

Mr. Michael, in his deposition, agreed with Mr. Ellis and stated that since the essential administrative steps relative to the opening of the public schools had been taken, any disruption "would seriously militate against orderly and efficient administration of the educational process to the lasting detriment of the school children of the City of Charlottesville." He went on to state that many months of careful consideration would be necessary to determine shifts of pupil population from one school to another since such shifts raised questions of distribution of teachers, and the number required, of available space in the various schools and of curriculum adjustments.

Cross-examination of the witnesses, Ellis and Michael, did not reveal any significant facts not already set forth above and there was no further material evidence presented to the District Court.

ARGUMENT

I.

The Respondents Are Prohibited by the Eleventh Amendment from Maintaining This Action

The Eleventh Amendment to the Constitution of the United States reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Although the Eleventh Amendment only expressly covers suits by citizens of another state or citizens or subjects of a foreign state, it has been interpreted as prohibiting suits

against a state by its own citizens. *Hans* v. *Louisiana,* 134 U. S. 1 (1890); *Fitts* v. *McGhee,* 172 U. S. 516 (1899); *Duhne* v. *New Jersey,* 251 U. S. 311 (1920); *Ex parte New York,* 256 U. S. 490 (1921).

A.

This Action Is a Suit Against the State

As early as 1824 this Court in *Osborn* v. *Bank of United States,* 9 Wheat. 738, held that a state official possesses no official capacity when acting illegally and hence can derive no protection from an unconstitutional state statute.

In the case of *Ex parte Young,* 209 U. S. 123 (1908), the Attorney General of Minnesota had been found guilty of contempt of a federal court in that he had refused to dismiss mandamus proceedings brought to compel compliance with a state statute governing the rates of certain railroads. This Court held that the action in the federal court was not a suit against the state in that it sought only to enjoin a state officer from enforcing an unconstitutional statute.

In *Georgia R. R. & Banking Co.* v. *Redwine,* 342 U. S. 300, 304 (1952), a case to enjoin a state officer of Georgia from enforcing an allegedly unconstitutional tax, the late Chief Justice Vinson, speaking for the Court, said:

> "* * * This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State. These decisions were reexamined and reaffirmed in *Ex Parte Young,* 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441, 13 L. R. A. NS 932, 14 Ann. Cas. 764 (1908), and have been consistently followed to the present day. * * *"

For the purposes of this argument, the petitioners accept the principles enunciated in the foregoing cases, namely, that

when there is a showing that the exertion of state power overrides rights secured by the Constitution, an appropriate proceeding may be brought *against the individuals charged with the transgression.* See, *Sterling* v. *Constantin,* 287 U. S. 378, 397 (1932).

However, the instant case has been brought against a local school board which is concededly an agency of the Commonwealth of Virginia. The action of the petitioners is the action of the state, since local school boards and division superintendents are the means through which the state performs its function of maintaining a public school system. See, *Board of Supervisors* v. *County School Board,* 182 Va. 266 (1944) and *O'Neill* v. *Early,* 208 F. (2d) 286 (4th Cir., 1953).

Accordingly, the respondents, in absence of state consent, cannot maintain this action because of the prohibitions of the Eleventh Amendment. It has been urged, however, that if such be the holding of the Court, the respondents would be unable to enforce rights secured by the Constitution. This, of course, is not true, since it is conceded that the respondents may, in an appropriate proceeding, sue individuals who may be charged with violating their rights under color of an unconstitutional statute.

It has also been suggested that the school board is suable because if acting as charged in the complaint, it is not acting as an agency of the state. A state may act only through its officers and agencies. Therefore, an agency of the state is the state itself. The question immediately arises, then, as to when is a state not a state. If it be held that a state is not a state when it acts in an unconstitutional manner, the prohibitions contained in the Eleventh Amendment would be drastically limited, contrary to their plain meaning, and to the decisions rendered thereunder.

The proper interpretation of the Eleventh Amendment,

in so far as its applicability to particular types of suits, is found in the following language of *Missouri* v. *Fiske*, 290 U. S. 18, 25-27 (1933):

> "The Eleventh Amendment is an explicit limitation of the judicial power of the United States. . . . However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The 'entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.' *Ex parte New York*, 256 U. S. 490, 497. Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States. *Hans* v. *Louisiana*, 134 U. S. 1, 10; *Palmer* v. *Ohio*, 248 U. S. 32, 34; *Duhne* v. *New Jersey*, 251 U. S. 311, 313, 314."
>
> ". . . Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State. This conception of the Amendment has had abundant illustration. *Louisiana* v. *Jumel*, 107 U. S. 711, 720; *Hagood* v. *Southern*, 117 U. S. 52, 67; *In re Ayers*, 123 U. S. 443, 497; *Fitts* v. *McGhee*, 172 U. S. 516, 529."

Therefore, it must be concluded that the Eleventh Amendment prohibits a suit against a state whether the nature of the suit involves interest in property or civil rights of individuals.

In conclusion, the petitioners repeat that they do not contend that the Eleventh Amendment prohibits a suit against individual members of a local school board or against a division superintendent as an individual acting under an unconstitutional statute. Individuals have not been named in the

instant case nor have they been served with process. This action is a suit against the state in name and in fact, and as such, should be dismissed, unless it can be successfully contended that the state has consented to be sued.

B.

THE STATE HAS NOT GIVEN ITS CONSENT TO BE SUED IN A FEDERAL COURT

The school board is created by statute as a body corporate, and among its enumerated powers is the power to sue and be sued. Section 22-94, Code of Virginia (1950). The question to be decided is whether or not the section applies only to suits in state courts. Three decisions of this Court hold that consent to suit in the federal courts will not be implied, but must be expressly stated by statute.

In *Great Northern Life Ins. Co.* v. *Read,* 322 U. S. 47 (1944), a foreign insurance company brought suit in a federal district court to recover the tax paid under protest on premiums written in the state. Although the statutory provision for appeal of such taxes provided that "all such suits shall be brought in the court having jurisdiction thereof," this Court held that the clear implication of the statute as a whole was that the state consented only to suit in its own courts. The Court stated at page 54:

> ". . . When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the Federal courts to be astute to read the consent to embrace Federal as well as state courts. Federal courts, sitting within states, are for many purposes courts of that state, *Madisonville Traction Co.* v. *St. Bernard Min. Co.,* 196 U. S. 239, 255, 49 L. Ed. 462, 468, 25 S. Ct. 251, but when we are dealing with the

> sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."

In *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459 (1945), this Court reaffirmed its position in the *Read* case under similar facts. Although the state statute authorized action in "any court of competent jurisdiction," this Court, on considering the whole statute, failed to find the requisite clear indication of consent to suit in a federal court.

The case of *Kennecott Copper Corp.* v. *State Tax Comm'r,* 327 U. S. 573 (1946), again illustrates the position taken by the Court on this question. There, the applicable state statute also provided only that one "may bring an action in any court of competent jurisdiction." This Court nevertheless held that the suit could not be brought in a federal court and concluded at pages 579-580:

> "We conclude that the Utah statutes fall short of the clear declaration by a state of its consent to be sued in the federal courts which we think is required before federal courts should undertake adjudication of the claims of taxpayers against a state."

The Court of Appeals for the Fourth Circuit has also concluded that the statute now under consideration does not authorize a suit against a local school board in a federal court. In *O'Neill* v. *Early, supra,* at page 288, Chief Judge Parker, speaking for the Court, said:

> "The fact that the state has authorized the defendant school board to sue and be sued is immaterial, since it has not consented to suit in the federal court. * * *"

Compare, *Maia* v. *Eastern State Hospital*, 97 Va. 507 (1899), wherein it was held by the Supreme Court of Appeals of Virginia that simply because a public corporation was authorized by statute to sue and be sued, it did not follow that it could be sued in all cases in which a private corporation may be sued.

It must be concluded, therefore, that since this action is a suit against the state for which consent has not been given, it must be dismissed as violating the Eleventh Amendment.

II.

Respondents Have Failed to Prove a Case Upon Which the District Court Could Have Granted Injunctive Relief

This court is now asked to consider one of its first cases against a school board which was not a party in *Brown* v. *Board of Education of Topeka* (May 17, 1954), 347 U. S. 483, and (May 31, 1955) 349 U. S. 294. Therefore, it is to be assumed that the decision in this case must create the original and fundamental precedents relating not only to procedural requirements in federal district courts but relating also to the requirements of proving whatever specific facts as are necessary, as a matter of substantive law, to support the specific relief thought to be afforded by the doctrine of the *Brown* case. Hence, it is felt with good reason that the point presented here is of great importance both to the final determination of this case and to the subsequent consideration of similar cases by other district courts.

To present the point clearly it is necessary to show the theory upon which the respondents proceeded in the district court. Some idea of that theory can be gathered from the so-called "petition" sent to the local school board by NAACP attorneys purporting to represent a certain group

of Negroes. This "petition" merely called the school board's attention to the decision in the *Brown* case, construed it to require the early elimination of segregation in the public schools and demanded that immediate steps be taken "to reorganize the public schools under your jurisdiction so that children may attend them without regard to their race or color." Subsequently, the same attorneys, purporting to represent substantially the same persons as listed in the "petition" filed their complaint alleging, among other things, that the petitioners maintain and operate separate public schools for Negro and white children, respectively, and deny the infant respondents, because of their race and color, admission to and education in public schools operated for white children, pursuant to a policy, practice, custom and usage of segregating, on the basis of race or color, all the children attending the public schools; and further that the petitioners will continue to pursue against the respondents, and all other children similarly situated, the same policy, practice, custom and usage unless restrained and enjoined from so doing.

The petitioners assert that even assuming this properly to be a class action, the only persons coming within said class are citizens of the United States residing in the Commonwealth of Virginia who are otherwise duly qualified for admission to the public schools, and who have applied for and been denied such admission.

The only issue then, squarely presented by the pleadings, amounts to this: Is the local school board specifically denying any one of the respondents the right, which he or she should properly have, to attend a particular school?

Whatever the policy, practice, custom and usage may be, they are not directly relevant to the issues in this case. If they result in segregation in the public schools *solely because of race and not because of any other factors* it is assumed

that they must be abandoned under the doctrine of the *Brown* case. But, and this is the important point, neither in the *Brown* case, nor in any of its companion cases, did any court decide that any particular Negro child, or particular group of Negro children under the jurisdiction of the petitioners were being denied the rights now guaranteed to them. In short, it would seem obvious, that it is no longer necessary for a district court to reaffirm the doctrine of the *Brown* case but it is necessary, and we would think mandatory, in the interests of fairness and orderly procedure, for the district court to apply the doctrine of the *Brown* case to the facts presented, and to decide specifically whether any respondent has carried the burden of showing that he or she is being unlawfully denied admission to a particular school.

In the instant case, the district court merely reaffirmed the doctrine of the *Brown* case and ordered the petitioners to cease the practice of segregation commencing on a specified date. It is admitted, of course, that in any suit seeking injunctive relief the trial court may fix a time from which the injunction is to operate, if granted. But it also must be assumed that the basic requirements of civil procedure demand that each respondent prove both a specific right and the denial of that right before he or she obtains a decree enjoining the denial of the right.

The position here taken suggests no more than an adherance to basic and well-established principles of civil procedure and it is thoroughly consistent with that part of the implementing decision in the *Brown case* (349 U. S. 294) which had the effect of remanding the cases then pending to the respective district courts for final determination in accordance with the principal decision. This Court was careful to make these provisions for the guidance of the trial courts to which the cases were being remanded, saying at pages 299-300:

"Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

"In fashioning and effectuating the decrees the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the pub-

> lic interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."

It must be remembered that although this Court had established a general constitutional doctrine applicable to all jurisdictions, procedurally its decisions were directed to the parties in the cases before it. Previously, each case had been tried in its respective trial court; abundant evidence had been taken in each case and presumably the plaintiffs had successfully carried the burden of proving by sufficient facts, a right to enter a white school and a denial of that right. Therefore, this Court, having reached its decision, only had to direct the respective trial courts to carry out the mandate, taking into account the various considerations hereinabove quoted.

Now let us examine the evidence produced in the instant case and inquire whether any one of these respondents has proved a specific right, and that he or she is being denied that right. Obviously, the only specific right which could be proved in this case is the right to transfer from one public school to another. It was suggested in *Briggs* v. *Elliott,* 132 F. Supp. 776, that the right of any qualified individual, regardless of race, to attend any public school of his choice

was not necessarily a general right permitting every Negro child to attend a heretofore all-white public school. The clear language of the decision affords no different interpretation for, speaking of this Court's decision, the three-judge district court stated at page 777:

> "* * * It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that the state may not deny any person on account of race the right to attend any school that it maintains. * * * The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. * * *"

Specifically, the right exists and must be recognized when an individual Negro child shows that he is fully qualified and desires to attend a particular school. He must show his qualification and right to transfer from one school to another by making known the particular school he seeks to attend; by showing that both the school and his residence are so located geographically as to make his attendance there practicable; by showing that the physical facilities in the particular school will accommodate him; and by showing that he is at least as well suited to attend as those already in attendance. These factors should be easy to prove in any particular case, if they exist, but upon the failure to prove them, there could be no finding of specific discrimination on the basis of race, and such a finding is essential to the relief here sought. Therefore, to complete the requirement,

it would appear that any plaintiff or group of plaintiffs, having affirmatively established the right to be admitted to or to transfer to another school, must prove the denial of that right, solely because of race.

We believe these conclusions to be logical, well supported by the authorities and eminently sound. If they be, then what have the respondents proved in the instant case? Only these facts: that they are Negroes, living within the jurisdiction of the school board; that the infants of the class attend and are entitled to attend public schools; that the school board operates elementary and high schools, heretofore attended by white students, and elementary and high schools heretofore attended by Negro students; and that apparently no change in the program was contemplated as of the date of the trial below. Not one of them has attempted to show that he is as well situated to attend another school as the one he is now attending. There is no evidence in this record giving the exact location of the various schools or of the residence of the respondents, or a description of the public school transportation facilities now available, or the ages and grade levels of the respondents, or the present enrollment and maximum capacities of the various schools, or the identity of the school into which they may wish to be transferred. None of them have even applied for admission in another school, and as far as the record will disclose they may all voluntarily choose to stay in the schools they are now attending. The fact that opposing counsel, openly and obviously representing the NAACP through the individuals here named as respondents, may contend otherwise makes no difference because not one of these respondents has testified that he seeks or will seek admission to another school.

It is therefore perfectly clear that, unless all of the underlying principles of civil procedure are disregarded, the con-

clusion is inescapable that not one of these respondents are entitled to any specific relief for the simple reason that they have thoroughly and completely failed to carry the burden of proof.

In conclusion, it is respectively submitted that the order of the District Court can leave these respondents in no different posture than that in which they found themselves immediately after this Court decision in the *Brown* case. If any of them should claim an abridgment of the right to transfer from one school to another, the *Brown* case will supply the trial court with the constitutional principle which must be applied. However, relief in the very nature of the case must be specific and accorded only after affirmative proof of the essential facts and circumstances giving rise to an individual right and the denial of that right on account of race.

III.

The Respondents Have Not Exhausted Their Administrative Remedies

As already pointed out, the respondents have not applied for admission to any particular school. They have made only general requests that the school system be reorganized. Thus, in fact, the respondents have not even resorted to their administrative remedies, though the law requires that they be exhausted before seeking injunctive relief.

Section 22-57 of the Code of Virginia (1950) provides for appeals from the actions of school boards. The respondents have alleged in their complaint that they have no remedy other than injunctive relief. The plain language of Section 22-57 is thus ignored. This is a class action. Therefore, all of the respondents, or any five of them, who may have felt themselves aggrieved by any action of the

school board, could have appealed such action to the division superintendent of schools. If their complaint was not then adjusted, any one of them would have the right to appeal to a court of record. Such an appeal would require no further pleading and the court would not be bound by any illegal action of the local school board, or the division superintendent.

The case of *Carson* v. *Board of Education of McDowell County*, 227 F. (2d) 789 (4th Cir., 1955), wherein it was held that federal courts would not intervene until state administrative remedies had been exhausted is pertinent. The complaint in that case was filed before this Court's decision in the school segregation cases and the plaintiffs requested, among other things, equal educational facilities for Negro children. The district court dismissed the action on the ground that the decisions of this Court had made inappropriate the relief prayed for in the complaint. However, the Court of Appeals vacated the order on the ground that the plaintiffs were entitled to a declaratory judgment of their right to attend school without discrimination and remanded the case to the district court. The district court was directed to consider state administrative remedies for persons aggrieved by actions of local school boards.

The language in the *Carson* case is applicable to the instant case. Accordingly, it is quoted fully, beginning at page 790, as follows:

> "In further consideration of the case, however, the District Judge should give consideration not merely to the decision of the Supreme Court but also to subsequent legislation of the State of North Carolina providing an administrative remedy for persons who feel aggrieved with respect to their enrollment in the public schools of the state. The Act of March 30, 1955, entitled 'An Act to Provide for the Enrollment of Pupils in Public Schools,' being chapter 366 of the Public

Laws of North Carolina of the Session of 1955, provides for enrollment by the county and city boards of education of school children applying for admission to schools, and authorizes the boards to adopt rules and regulations with regard thereto. It further provides for application to and prompt hearing by the board in the case of any child whose admission to any public school within the county or city administrative unit has been denied, with right of appeal therefrom to the Superior Court of the county and thence to the Supreme Court of the state. An administrative remedy is thus provided by state law for persons who feel that they have not been assigned to the schools that they are entitled to attend; and it is well settled that the courts of the United States will not grant injunctive relief until administrative remedies have been exhausted. *Meyers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51, 58 S. Ct. 459, 82 L. Ed. 638; *Natural Gas Pipeline Co. of America* v. *Slattery*, 302 U. S. 300, 310, 311, 58 S. Ct. 199, 82 L. Ed. 276; *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 172, 55 S. Ct. 7, 79 L. Ed. 259; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463, 54 S. Ct. 471, 78 L. Ed. 909; *P. F. Petersen Baking Co.* v. *Bryan*, 290 U. S. 570, 575, 54 S. Ct. 277, 78 L. Ed. 505; *Porter* v. *Investors' Syndicate*, 286 U. S. 461, 52 S. Ct. 617, 76 L. Ed. 1226; *Matthews* v. *Rodgers*, 284 U. S. 521, 525-526, 52 S. Ct. 217, 76 L. Ed. 447; *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150.

"This rule is especially applicable to a case such as this, where injunction is asked against state or county officers with respect to the control of schools maintained and supported by the state. The federal courts manifestly cannot operate the schools. All that they have the power to do in the premises is to enjoin violation of constitutional rights in the operation of schools by state authorities. Where the state law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such

administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary. As said by Mr. Justice Stone in *Matthews* v. *Rodgers, supra* (284 U. S. 525): 'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.' Interference by injunction with the schools of a state is as grave a matter as interfering with its fiscal operations and should not be resorted to 'where the asserted federal right may be preserved without it.'"

The more recent case of *Hood* v. *Board of Trustees*, 232 F. (2d) 626 (4th Cir., 1956), reaffirmed the principle enunciated in the *Carson* case in the following language:

"This is an appeal from the denial of a motion for summary judgment in an action by school children for an injunction to prevent discrimination on the ground of race. As the denial of motion for summary judgment is not a final judgment in the case, we can entertain the appeal only by considering the denial of the motion as a denial of injunctive relief. So considered, the order denying such relief must be affirmed, as the administrative remedies prescribed by the recent South Carolina statute[1] have not been exhausted. *Carson* v. *Board of Education of McDowell County*, 4 Cir., 227 F. 2d 789. As plaintiffs were not entitled to injunctive relief for this reason, we affirm the order in so far as it denies an injunction, without passing upon other questions raised in the case or approving the reasoning of the court below in denying the motion for summary judgment."

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[1] An Act to amend sections 21-103 and 21-46 of the Code of Laws of South Carolina, 1952, Approved March 8, 1956.

Since the respondents have merely filed a "formal" petition demanding the reorganization of the school system in light of the school segregation decisions, it is perfectly obvious that they have not exhausted their state administrative remedies. The respondents may feel aggrieved by the action of the local school board, or many, or all of them, may have no legal or justifiable grounds for feeling aggrieved. It is, therefore, submitted that the instant case should have been remanded to the District Court with directions that the complaint be dismissed.

IV.

The District Court Abused Its Discretion by Entering an Order Effective September, 1956

Since the decision in the school segregation cases of May 17, 1954, approximately sixty-five cases have been brought seeking an end to segregation in the public schools and colleges. At least one case has been filed in each of the seventeen states traditionally practicing some form of school segregation except in the State of Mississippi.

The decrees entered by the three-judge district courts in the original South Carolina and Virginia cases enjoined the school officials from denying Negroes admission, on account of race or color, to the schools under their jurisdiction, but refused to set a time limit for the ending of segregation. See particularly, *Briggs* v. *Elliott*, *supra*. With these cases as a precedent, the courts in those states having large Negro populations, although holding that segregation must cease, have likewise declined to set any time limits.

For example, the district court in *Bush* v. *Orleans Parrish School Board*, 138 F. Supp. 337 (U.S. D.C., E.D., La., 1956), entered a decree in language almost identical to the

decree entered in *Briggs* v. *Elliott, supra,* and in the case of *Matthews* v. *Launius,* 134 F. Supp. 684 (U.S. D.C. W.D. Ark. 1955), the district court said at pages 686-687:

> "In determining the question the court may and should consider all problems related to administration arising from the physical condition of the school plant, the school transportation system, personnel, and revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis.
>
> * * *
>
> "This court fully realizes the immensity of the task confronting the defendants and that because of the lack of school finances, the crowded conditions of the present facilities and the necessity to readjust the system that has been followed for decades, that additional time is necessary and the court feels that better progress may be made at this time without the issuance of an injunction, but all parties in interest should realize that the court in the administration of the law must, within a reasonable period of time and as soon as practicable, require the school authorities to conduct the public schools in the district on a racially non-discriminatory basis."

The district court departed from the trend of decisions found in those states with heavy Negro populations by ordering immediate desegregation, and in so doing, imposed an almost impossible task on the petitioners.

The evidence presented in this case conclusively showed that the petitioners could not desegregate the public schools of the City of Charlottesville within the time required by the court below without disrupting the school system to the detriment of all the school children. Under such circumstances, the court below abused its discretion by entering a "forth-

with" decree. At worst, the petitioners should have been given a reasonable time to solve local problems and make necessary arrangements to cope with the decision of this court in the school segregation cases.

CONCLUSION

It is respectfully submitted that the Court below has decided important questions under the Constitution of the United States and under the decisions of this Court in the school segregation cases which have not been, but should be, settled by this Court.

Respectfully submitted,

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February 8, 1957.

CERTIFICATE OF SERVICE

I Hereby Certify that copies of the aforegoing petition have been served by mailing the same, with first class postage prepaid, to the following counsel of record:

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on this 8th day of February, 1957.

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HENRY T. WICKHAM